Nos. 15-1607 & 15-1563

In the United States Court of Appeals for the Sixth Circuit

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

JAG HEALTHCARE, INC., D/B/A GALION POINTE, LLC

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW FROM THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND CROSS-APPLICATION FOR ENFORCEMENT OF THE DECISION AND ORDER IN CONSOLIDATED CASE NUMBERS 08-CA-039029, 08-CA-039112, 08-CA-039133

PETITION FOR REHEARING EN BANC OF RESPONDENT/CROSS-PETITIONER JAG HEALTHCARE, INC.

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I. STATEMENT IN SUPPORT OF EN BANC REVIEW

Pursuant to Federal Rule of Appellate Procedure 35 and Local Appellate Rule 35.1, Respondent Cross-Petitioner, JAG Healthcare, Inc. (hereafter "JAG") hereby respectfully submits that the Panel Decision issued on December 13, 2016 ("Panel Decision"), holding that one or two comments by JAG's President, Jim Griffiths ("Griffiths") were coercive and therefore evidence of "[m]any of the unfair labor practices found by the Board" is inconsistent with precedent from the National Labor Relations Board ("NLRB") and the Sixth Circuit, including *P.S. Elliott Services*, 300 NLRB 1161 (December 31, 1990); *E. Essential Servs.*, 2016 NLRB Lexis 320 (May 2, 2016); *DTR Industries, Inc. v. NLRB*, 39 F.3d 106 (6th Cir. 1994) (DTR I); and *DTR Industries, Inc. v. NLRB*, 297 F. App'x 487 (6th Cir. 2008) (DTR II). The decision would erode well-established employer free speech rights where such speech is based on objective facts and is not inherently coercive. It conflicts with precedent within this Sixth Circuit.

JAG also submits that the Panel Decision holding that JAG failed to administratively preserve its argument that it is not the proper legal entity responsible for the unfair labor practices at issue is inconsistent with obligations under the National Labor Relations Act ("NLRA") and precedent from the Sixth Circuit and NLRB, including: 29 C.F.R. 102.46(b)(1); *Temp-Masters, Inc. v. NLRB*,

460 F.3d 684, 690 (6th Cir. 2006); *Capital EMI Music*, 311 NLRB 997 (May 28, 1993) and *Paragon Sys.,* 2015 NLRB LEXIS 653 (August 26, 2015).

For each of these reasons, JAG respectfully requests an en banc review of the Panel Decision in order to secure and/or maintain uniformity of the court's decisions.

II. ARGUMENT

A. The Panel Decision Holding Griffiths Statements Were Coercive Conflicts with Precedent from the NLRB and the Sixth Circuit

Despite correctly acknowledging the chaotic and incredibly short period of time between Galion Pointe's[1] decision to take over a failing nursing home in Ohio, and when it actually did take over operational control, the Panel did not acknowledge, much less properly credit the established administrative procedures used by Galion Pointe to facilitate this process, or the historical understanding of these procedures by Griffiths when making statements about whether Galion Pointe would be unionized on the first day that it took operational control.

Based on the depth of Griffiths' knowledge, and his thirty years of experience assisting operating companies, like Galion Pointe, who take over struggling nursing homes, Griffiths' expressions about unionization were nothing more than objective

[1] The Panel Decision incorrectly cites that JAG, a management company responsible for basic human resource functions, is the legal entity responsible for managing, overseeing and taking over struggling nursing homes in Ohio. (ECF # 74-1, p. 2). This holding is not supported by the record evidence. Rather, it is largely undisputed that these functions are actually performed by independent operating companies like Galion Pointe. (Id.).

statements of fact/opinion and protected free speech under Section 8(c) of the NLRA and the First Amendment to the U.S. Constitution.

1. The Panel Decision Improperly Limits An Employer's Ability to Make Statements of Fact and Opinion Protected by the National Labor Relations Act and the First Amendment to the U.S. Constitution

Employers maintain the right to engage in free speech regarding their views of unions and unionization under Section 8(c)[2] of the NLRA. However, Section 8(a)(1) provides an exception and makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights" to organize, join or assist unions, bargain collectively, and engage in collective action. 29 USC § 158(a)(1); *see also* NLRA § 7, 29 USC § 157.

Section 8(a)(1) violations occur when *substantial evidence* demonstrates that the employer's statements, considered from the employees' point of view, have a reasonable tendency to coerce. *Beverly Health & Rehab. Servs. v. NLRB*, 297 F.3d

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[2] Section 8(c) of the National Labor Relations Act, 29 U.S.C.S. § 158(c) dictates that an employer has the right to express any views, argument, or opinion so long as such expression contains no threat of reprisal or force or promise of benefit. Under § 158(c), an employer is free to communicate to employees a statement of opinion about the union as well as predict the effect of unionization on the workplace so long as such a prediction is based on objectively verifiable facts and it does not contain a threat of reprisal or force. Section 158(c) merely implements the First Amendment rights already possessed by employers. An employer's free speech right to communicate his view to his employees is firmly established and cannot be infringed by a union or the NLRB.

468, 476 (6th Cir. 2002); *Peabody Coal v. NLRB*, 725 F.2d 357, 363 (6th Cir. 1984). However, statements, even those that imply negative views of the value of unionism, are not coercive if they express a reasonable belief based on objective facts or that describe management decisions made prior to the union action. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-19 (1969).

In this case, the Panel Decision properly acknowledges that "[**m**]**any** of the unfair labor practices found by the Board are premised on a finding that comments made by Griffiths regarding the unionization of the staff at Galion Pointe were coercive." (ECF #74-1, p. 9) (emphasis added). Despite this holding, the **only** statements the Panel attributes to Griffiths are as follows:

> Griffiths…emphasized that none of JAG's nursing homes were unionized and that, as of the next day, there would be no union at the newly named Galion Pointe. Griffiths also said that employees could unionize later if they wished, but that he did not believe they would need union representation.

(ECF #74-1, p.4). Because these statements are inherently non-coercive and contain absolutely no threat of any kind, the Panel did not find these statements unlawful on their face; rather, the Panel identified two situations which form a "key part of the context in which Griffiths'….statements were made" and which were used to classify Griffiths' statements as coercive. (Id.).

Specifically, the Panel Decision held: (1) Griffiths asked nursing staff to call the police in order to remove any union organizers who came to Galion Pointe; and

(2) that "JAG threatened to call the police if [a Union Representative] did not leave the Village Care facility prior to the meeting with staff provides helpful context." (ECF #74-1, p. 10). Both of these holdings are inconsistent, however, with the undisputed record evidence.

First, Griffiths did not ask the nursing staff to call the police. Instead, on June 30, 2010, certain Village Care managers asked Griffiths what employees should do if union organizers decided to trespass on the property. Griffiths simply replied that employees should treat union organizers *like any other trespasser* and call the police. However, no police were ever called and no hourly employees overheard Griffiths speak on this issue. Moreover, there is no tangible evidence that the non-solicitation and non-distribution policy at issue was unevenly applied against the union or that it was not applicable to every other type of trespasser at the facility. The ALJ and the Board specifically credited Griffiths' statements in this regard.

Second, there is no record evidence to support the Panel's holding that JAG threatened to call the police if a union representative failed to leave the premises. Instead, it is undisputed that on June 30, 2010 a former Village Care manager (Andrella) asked a union representative (Courtright) to leave the premises pursuant to Village Care's (the predecessor to Galion Pointe) collective bargaining agreement with the Union. Neither JAG nor Galion Pointe had anything to do with this interaction or the threat of police activity.

Outside of these two inaccurate findings, the Panel points to no other substantial evidence to support its holding that Griffiths' facially neutral statements were somehow coercive. Instead, Griffiths' statements amounted to nothing more than objective, truthful statements based entirely on un-disputed facts as known to him at the time. These statements are not only lawful, but they are consistent with precedent from the NLRB and the Sixth Circuit.

For example, in *P.S. Elliott Services*, 300 NLRB 1161, 1162 (December 31, 1990), the employer made a statement to would-be employees indicating that the facility would initially be "a non-union facility." This statement was found not to be coercive because it was a truthful statement based on known objective facts and was "not accompanied by any threats, interrogations, or other unlawful coercion." (See also ECF # 74-1, p. 11). In *E. Essential Servs.*, 2016 NLRB Lexis 320 (May 2, 2016), the Administrative Law Judge ("ALJ") held that statements that a Company does not expect to have a union, based on some degree of objectivity, lacks coercion and any implied threat of harm. Similarly, in *Dr. Pepper Snapple Group*, 357 NLRB 1804 (2011), cited by JAG but not substantively addressed by the Panel, the ALJ found that a statement that the employer would "open nonunion" was found to be lawful (and upheld by the Board) because there was no indication that the statement was objectively false, nor was there other supporting information suggesting that it was reasonable to interpret the statement as potentially or likely to be coercive. *Dr.*

Pepper Snapple, like the case at bar, involved a confusing and fluid situation where employees were being transferred between facilities. Company representatives made statements that the facility would open non-union, based on objective facts it knew at the time they made the statement. The court upheld the Company's right to make these statements in the context in which they were made.

This Court has also provided two clear examples of how to delineate between protected employer expression and impermissible coercive statements. *See e.g., DTR Industries, Inc. v. NLRB*, 39 F.3d 106 (6th Cir. 1994) (*DTR I*), and *DTR Industries, Inc. v. NLRB*, 297 F. App'x 487 (6th Cir. 2008) (*DTR II*). Both cases involved an employer's statements about the potential negative effects of unionization at its company. In *DTR I*, the court found that the employer's statements were protected because they were objective predictions that customers sole-sourcing with the employer were likely to split their business to ensure an alternative supply source in the event of a strike. 39 F.3d at 114. *DTR II*, in contrast, found that the employer's similar predictions about sole-source business, when combined with an explicit statement that the decrease in business would absolutely lead to layoffs, constituted a coercive threat unprotected by NLRA § 8(c). 297 F. App'x at 493.

Based on these cases, the statements attributed to Griffiths by the Panel are "incomparable with the predictions of dire economic ruin" in *DTR II* and other cases where § 158(c)'s protection did not apply. To the contrary, Griffiths' statements did

not suggest or even imply that efforts to unionize would lead to any economic harm or make a direct or indirect threat of any kind.

In short, Griffiths merely expressed, in a non-coercive manner, his objective view that Galion Pointe would not be unionized on the first day that it took over operational control and also that he believed that Galion Pointe employees did not need union representation (although the ultimate choice was up to them). This communication is not only lawful, it is free speech protected by Section 8(c) of the Act and the First Amendment of the U.S. Constitution. *See NLRB v. Virginia Elec. & Power Co.,* 314 U.S. 469, 477 (1941); *Thomas v. Collins*, 323 U.S. 516, 537-38 (1945) (employers have a First Amendment right to engage in non-coercive speech about unionization); *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966) (Section 8(c) of the Act manifests a "congressional intent to encourage free debate on issues dividing labor and management"); *Letter Carriers v. Austin*, 418 U.S. 254, 272-73 (1974) (the Act promotes "uninhibited, robust, and wide-open debate" and the "freewheeling use of the written and spoken word.").

In contrast, the Panel Decision cites to *Kessel Food Markets,* 287 NLRB 426, 429 (December 16, 1987), *enforced* 868 F.2d 881 (6th Cir. 1989), *cert denied* 492 U.S. 820 (1989) and its progeny; however, that case and its lineage are clearly distinguishable. In *Kessel*, the Board found that statements made to applicants by officials of a prospective successor employer, that the stores would be non-union,

were coercive and violative of Section 8(a)(1) of the Act. The Board held that the reason for the violation was because "the employer does not know whether it will be union or non-union until it has hired its workforce." This case is distinguishable. On June 30, 2010, Griffiths had objectively verifiable facts indicating that it was unlikely Galion Pointe would hire a majority of the Village Care bargaining unit.

For example, when Griffiths and Cooley first considered leasing the facilities owned by Cardinal, they conducted a careful review of the financial data and viability of the nursing home facilities. In performing this analysis, Griffiths learned of the financial turmoil that plagued Galion Pointe and that it was created, in principal, by significant overstaffing combined with a large number of underperforming employees. Thus, well before JAG or Galion Pointe were even incorporated in the state of Ohio, Griffiths understood that the only way to make Galion Pointe profitable would be to make personnel changes to improve quality and efficiency of patient care. While perhaps ultimately a third or more of the staffing levels could be filled by Village Care employees, half or more would need to be filled by the more qualified and experienced personnel provided by JAG. This would allow Galion Pointe to maintain continuity of patient care while taking an aggressive stance on the financial viability of the facility and improving performance across the board.

Based on Griffiths' thirty plus years of experience in the nursing home industry, his first hand analysis of the financial status of Village Care, his knowledge of the administrative procedures utilized by Galion Pointe in taking over Village Care, and his impressions of the most likely outcome as to union representation despite the chaos of Galion Pointe's takeover of Village Care, he possessed objectively verifiable facts which indicated that Galion Pointe would likely hire half or less of its workforce, or approximately 15 former Village Care bargaining unit members. This supports Griffiths' statements as lawful under NLRB and the Sixth Circuit's precedent, and as protected free speech under Section 8(c) of the NLRA, the First Amendment to the U.S. Constitution. The panel's decision is thus inconsistent with Sixth Circuit precedent.

2. The Panel Decision Creates an Untenable Burden on Employers to Identify, With Exact Particularity, the Basis for Every Objection in Order to Preserve an Issue for Appeal

The Panel Decision incorrectly posits that JAG failed to adequately raise an administrative exception which apprised the Board of its intent to appeal whether it is the correct legal entity responsible for the unfair labor practice at issue. (ECF #74-1, p. 7). However, JAG adequately preserved several key exceptions on this very issue which satisfied all of the statutory provisions of the NLRA and precedent from this Circuit.

For example, under 29 C.F.R. 102.46(b)(1), a valid exception must "**concisely** state the grounds for each exception." (emphasis added). Stated another way, an exception need only put the Board on notice of the general legal issue that is being challenged. That is all that is required. This standard is reinforced by *Temp-Masters, Inc. v. NLRB*, 460 F.3d 684, 689 (6th Cir. 2006). In *Temp-Masters, Inc.,* the very case cited in the Panel Decision, the employer argued that a particular transfer was sufficiently not adverse to constitute an unfair labor practice charge. This was primarily because **none** of the administrative exceptions filed in that case **even mentioned or alluded to** the idea that a transfer was not a sufficiently adverse to constitute an unfair labor practice charge, so that issue had never been raised before the Board.

Here, the Panel Decision's finding that "JAG never specifically objected to the fact that it was found to be the proper legal entity and never raised such an argument at any time during the administrative process" is inconsistent with the record evidence. (ECF #74-1, p. 8). In fact, the Panel Decision itself identifies the very exceptions which make JAG's point. Specifically, the Panel properly acknowledges that JAG put the Board on notice that it **did not operate** skilled nursing homes; rather, JAG clarified that it only served as a management company that provides basic human resource functions. Similarly, JAG filed an exception placing the Board on notice that it **does not acquire** nursing homes. Nor did JAG

ever enter into a lease or contractual agreement with the facility currently known as Galion Pointe. Perhaps more to the point, the significant number of exceptions filed by JAG on the very issue of its involvement with the Galion Pointe facility are markedly distinguishable from the complete lack of any notice provided to the Board in *Temp-Masters, Inc.*

Nor does the Panel reference any authority which requires an employer to cite with specific particularity to each and every potential application of an exception. Instead, employers need only place the Board on notice of its intent to raise an issue on appeal. Here, JAG did just that. It provided ample notice to the Board that did not believe that it was the correct legal entity responsible for the unfair labor practices at issue. That is all that is required of JAG under the NLRA and precedent from this Circuit to properly preserve the issue for appeal. Thus, the panel's decision is inconstant with Sixth Circuit precedent.

3. The Panel (and the Labor Board) Failed to Conduct Any Analysis Regarding the Relationship Between JAG and Galion Pointe and Improperly Held JAG Liable for Conduct Outside its Control

Despite claiming that JAG failed to administratively argue that it is not the correct legal entity responsible for the unfair labor practices at issue, the Panel still held that "JAG's appearance in this matter and its full, affirmative defenses of its actions on the merits belie the claim that it was named improperly as the respondent." (ECF #74-1, p. 8).

However, the General Counsel never pled or charged, the ALJ never found and the Board never adopted or confirmed that JAG and Galion Pointe are joint employers, single employers, alter egos, or any other legal entity where liability for unfair labor practices may be lawfully imputed or shared. *(See generally* ALJD, Page ID# 001819). Nevertheless, the Panel Decision still unilaterally decided that JAG was, in fact, the correct legal entity, without engaging in any substantive analysis of JAG's relationship with Galion Pointe. (ECF 74-1, p. 8).This is deficient, as a matter of law.

In assessing whether two legal entities are joint employers, single employers, or alter egos, the NLRB engages in a very fact intensive analysis that requires significant investigation and analysis of the business practices, corporate structure and interrelatedness of the entities in question. Under the Board's former joint employer standard, which was applicable in 2010 and at all times applicable to this case, a joint employer relationship only existed where "two separate entities share or codetermine those matters governing the essential terms and conditions of employment." In particular, an employer had to "meaningfully affect[] matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." *TLI, Inc.,* 271 NLRB 798, 798 (July 31, 1984); *Laerco Transportation*, 269 NLRB 324, 325 (March 21, 1984). The essential element was "whether a putative joint employer's control over employment matters is direct and

immediate." *Airborne Express*, 338 NLRB 597, 597 n1 (NLRB Nov. 22, 2002). The Board never took evidence on this issue or made such a determination.

Similarly, the Board never investigated whether JAG and Galion Pointe share common ownership, a common management system, interrelatedness of operations or a centralized manner of addressing labor relations. As such, the Board never determined if JAG and Galion Pointe legally constituted a single employer. *Shane Steel Processing*, 353 NLRB 58 (November 28, 2008). Finally, the Board never looked at whether JAG and Galion Pointe were alter egos, or whether they shared common ownership, management, business purpose, customers, employees and equipment. *Deer Creek Electric, Inc. and Black Hills Electric, Inc.*, 362 NLRB 171 (August 17, 2015).

Despite these limitations, the undisputed testimony and evidence at the hearing establish that JAG provides basic human resource functions to Galion Pointe, Shelby Pointe, and eight other independent nursing home facilities in and around Ohio. These services include bookkeeping, payroll and billing functions. Beginning on July 1, 2010, Galion Pointe began managing the day-to-day operations of a nursing home located in Galion, Ohio, including the hiring, firing and discipline of employees, management of patient services, supervision of employees and treatment of residents and patients, including continuity of care. Prior to July 1, 2010, Galion Pointe was the only legal entity to become a leasee and tenant of

Cardinal Nursing Homes, Inc., and a signatory to the lease agreement and operations transfer agreement. (GC Exh. 12, Page ID# 001932, GC Exh. 13, Page ID# 001932). JAG took no part in these actions. (*Id.*). The Panel made no mention of these facts. Nor did the Panel undertake its own *sua sponte* analysis of the relationship between JAG and Galion Pointe. Instead, the Panel Decision, just like the Board, offers a conclusory holding which assigns liability to JAG without engaging in any independent analysis. This is inconsistent with precedent.

In *Capital EMI Music*, 311 NLRB 997 (May 28, 1993) and *Paragon Sys.*, 2015 NLRB LEXIS 653 (August 26, 2015), the Board held an employer may be liable for the discriminatory employment actions of its joint employer where the record permits an inference that the non-acting employer "knew or should have known" the other employer acted with an unlawful motive and acquiesced in the unlawful action by either failing to protest or "exercise any contractual right it might possess to resist it." However, as the Board stressed in both of those cases that a necessary prerequisite for applicability of a theory of liability is a showing that the two employers are, in fact, jointly or singly liable.

The Sixth Circuit has ruled, e.g., *Carrier Corp. v. NLRB*, 768 F.2d 778 (6th Cir. 1985), that the NLRB must delineate the basis for a finding that two employers are joint employers under its standards. Yet here, in the underlying case, the board did not articulate its basis for such a finding of joint employer status. The panel

here, contrary to the Sixth Circuit precedent, did not require the Board to articulate its analysis.

Thus, the Panel Decision is incorrect in failing to make any tangible analysis of the actual relationship between JAG and Galion Pointe, as required under Sixth Circuit precedent. *Id.*; *see also Paragon Sys.*, 2015 NLRB LEXIS 653 (August 26, 2015).

III. CONCLUSION

For the above referenced reasons, JAG respectfully requests that this matter be returned to the docket as an active appeal and that this case be reheard en banc.

Respectfully Submitted,

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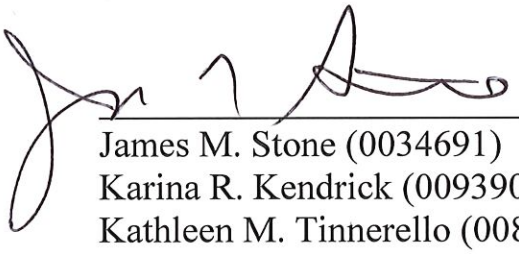
IV. CERTIFICATE OF COMPLIANCE

I certify that this Petition for Rehearing En Banc complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because this submission contains 23 pages and 3,820 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this Petition for Rehearing En Banc complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Petition has been prepared using Times New Roman 14-pointe font, a proportionately spaced typeface.

Dated this 27th day of January, 2017.

JACKSON LEWIS P.C.



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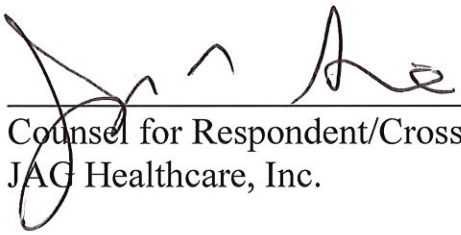
V. CERTIFICATE OF SERVICE

I, James M. Stone, an attorney, hereby certify that on January 25, 2017, I caused the **Petition for Rehearing En Banc for Respondent/Cross-Petitioner JAG Healthcare, Inc.**, to be filed electronically with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.



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